March 27, 2001

VIA HAND DELIVERY

Mary Cottrell, Secretary

Department of Telecommunications and Energy

One South Station

Boston, MA 02110

Re: Petition of Cape Light Compact for Certification of Energy Plan, DTE 00-47C

Dear Secretary Cottrell:

The Cape Light Compact hereby submits this letter and attachment as its brief in response to the March 21, 2001 Hearing Officer Memorandum posing the following question to the Parties:

G.L. c. 164, § 134(a) makes reference to "an aggregated entity ... not fully operational on the retail access date." G.L. c. 164, § 134(b) makes reference to "a municipality ... establishing a load aggregation program." Please discuss what, if any, inconsistency arises between the use of the terms "fully operational" in § 134(a) and "establishing" in

§ 134(b).

For the reasons set forth below and in the attachment, the Compact respectfully submits that there is no inconsistency whatsoever and that the term "fully operational" in § 134(a) has no application to the present case. For a detailed analysis of the meaning of the term "establishing" in § 134(b) which determines when a municipal aggregator is eligible for the funds at issue, the Compact respectfully refers the Department to its Memorandum of Law in Support of Petition Seeking Certification

of Energy Plan, filed as Tab 6 of its initial filing in this matter on December 4, 2000. (For the convenience of the Department, a copy of the Memorandum of Law is attached hereto as Exhibit 1.)

§ 134(a) sets forth the process by which a municipality or group of municipalities may act as "opt-out aggregators." In brief, a municipal aggregator may start the process upon a majority vote of town meeting (or other governing legislative body), shall consult with the Division of Energy Resources and develop a plan for local review meeting various standards and then seek the approval of the Department. All of these steps have been accomplished by the Compact, culminating in DTE approval of its aggregation plan and form of electric supply agreement on August 10, 2000. DTE 00-47.

§ 134(a), ¶5, makes clear that participation by any retail customer in a municipal aggregation is voluntary. Moreover, consumers participating in opt-out aggregations are given a one-time right to return to standard offer service for 180 days after enrollment in the aggregated entity. Because St. 1997, c. 164, § 247 (adding current G.L. c. 164, § 134(b)) was enacted

prior to the so-called "retail access date" when deregulation began in Massachusetts, the General Court found it appropriate to include certain transition language clarifying that this one-time right to return to standard offer service for those consumers located in the territory of a municipal aggregator "not fully operational on the retail access date" [March 1998], would not be triggered until thirty days after full operation of the aggregated entity. In other words, the opt-out procedure where all consumers (excepting those who affirmatively decline to participate) are switched to the aggregator's supplier was suspended until full operation of the aggregator. In this limited transitional circumstance, only those consumers who affirmatively "opt-in" would join the aggregation and other customers would therefore stay on standard offer service until the aggregator is "fully operational."

In the Compact's case, however, DTE approval of its aggregation plan and supply contract occurred more than two years after the retail access date and thus the provision cited in the briefing question never had any application to it.(1) More importantly, the provision in

§ 134(a) concerning an aggregator which is "not fully operational" on the access date has no import in any instance with respect to determining the meaning of "establishing" a load

aggregation program (and thus allowing preparation and certification of an energy plan) under §134(b). Related statutes are to be construed harmoniously when possible. Larson v. School Committee of Plymouth, 430 Mass. 719, 724 (2000). However, when there is a perceived conflict between two provisions in a statute or in related statutes, the provision that contains more specific language trumps a provision containing general language. Morey v. Martha's Vineyard Commission, 409 Mass. 813, 819 (1991).

The language in §134(b) is clear. A statute is to be construed as written in keeping with its plain meaning and an agency may not infer new meaning into a statute based on policy considerations. Massachusetts Community College Council MTA/NEA v. Labor Relations Commission, 402 Mass. 352, 353 (1988). In fact, the contrast with the §134(a) language makes even more apparent that the interpretation the Compact urges in its Memorandum of Law is the right one. Had the General Court wished to qualify a municipal aggregator's access to energy efficiency funds, it could have added such language, much as it qualified a municipal aggregator's right to automatically switch customers if the aggregator were not fully operational on the retail access date. General Electric Company v. Department of Environmental Protection, 429 Mass. 798, 803 (1999) (courts do not "'read into the statute a provision which the Legislature

did not see fit to put there, whether the omission came from inadvertence or of set purpose'" quoting King v. Viscoloid Co., 219 Mass. 420, 425 (1914)). The cardinal rule of statutory construction expounded by the Supreme Judicial Court in Lincoln-Sudbury Regional School District v. Brandt-Jordan Corporation, 356 Mass. 114, 117-118 (1969) and discussed at pages 4 and 5 of the Compact's Memorandum of Law squarely supports the Compact's position.

For the reasons stated in this letter-brief and the attached Memorandum of Law, the Compact respectfully urges the Department to certify its energy plan.

A final note is appropriate. It is imperative that the Department act quickly on this matter. The failure to act by March 19th as the Compact has requested has already created real practical problems with respect to the transition of programs from NSTAR to the Compact. For instance, an international non-profit organization constructing a large new headquarters on the Cape and wishing to include various energy efficiency measures eligible for financial support recently was told, understandably, by NSTAR representatives it contacted that NSTAR

was reluctant to commit funds in view of the fact that it was anticipated that the Compact soon would be offering all such programs in the region. As a result, this particular organization's building plans are left in a holding pattern until this case is decided if the organization still wishes to incorporate the energy efficiency features in its design.

The Compact believes that the public interest is disserved by any further delay in making a final determination in this case. Nor is the interest of NSTAR served, since, as evidenced by the anecdote recounted above, the Company may be unable to make commitments until this case is decided. In fact, and as is discussed in detail in the Transition Plan the Compact filed on March 2, 2001, the Company and Compact have agreed to a number of steps which must take place now in order to assure an orderly start-up of the Compact's program on July 1st. At present, the Compact has not even been able to execute a management contract with its chosen manager, Honeywell DMC, let alone implement those steps described in the Transition Plan which are necessary to keep to the timeline to which it and NSTAR have agreed.

Accordingly, the Compact renews its request to expedite

certification of its energy plan. See Compact's Motion to Certify Energy Plan by March 19, 2001. In particular, the Compact urges the Department to act as soon as possible, but in any event, no later than this Friday, March 30, 2001.

Sincerely,

Jeffrey M. Bernstein

Cristin Rothfuss

For the Cape Light Compact

JMB/drb

Enclosures

cc: Service List (attached)

Maggie Downey, Cape Light Compact (via facsimile)

Tim Woolf, Synapse Energy (via facsimile)

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EXHIBIT 1

COMPACT'S MEMORANDUM OF LAW

IN SUPPORT OF PETITION SEEKING CERTIFICATION OF ENERGY PLAN

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: PETITION OF TOWNS OF AQUINNAH, BARNSTABLE, BOURNE, BREWSTER, CHATHAM, CHILMARK, DENNIS, EASTHAM, EDGARTOWN, FALMOUTH, HARWICH, MASHPEE, OAK BLUFFS, ORLEANS, PROVINCETOWN, SANDWICH, TISBURY, TRURO, WELLFLEET WEST TISBURY, AND YARMOUTH AND COUNTIES OF BARNSTABLE AND DUKES
(acting as the CAPE LIGHT COMPACT) DTE 00-____
FOR CERTIFICATION OF ENERGY PLAN

COMPACTS MEMORANDUM OF LAW IN SUPPORT OF

PETITION SEEKING CERTIFICATION OF ENERGY PLAN

INTRODUCTION

The Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, and the counties of Barnstable and Dukes County, acting together as the Cape Light Compact ("Compact") have submitted to the Department of Telecommunications and Energy ("Department") their Energy Plan ("Plan") for certification pursuant to G.L. c. 164, §134(b) ("Section 134(b)"). This memorandum addresses an important legal issue that may arise during the Department's review of the Plan: whether the Compact is "establishing a load aggregation program"

as that phrase is used in G.L. c. 164, §134(b). Only municipalities that are "establishing a load aggregation program" are eligible to file energy plans and receive energy efficiency funds collected under G.L. c. 25, §19.

The Compact first raised the question of when a municipality will be deemed to be "establishing a load aggregation program" in a letter it sent to the Department on November 17, 1998. In that letter, the Compact sought an advisory opinion regarding the proper interpretation of the just-quoted language. The Division of Energy Resources ("DOER"), which has a statutory role in overseeing energy efficiency programs (G.L. c. 25A, §11G), offered its opinion that a municipal aggregator would have to meet five criteria to be "establishing a load aggregation program" and seriously questioned whether the then-extant facts justified the conclusion that the Compact was doing so.(2) In a letter dated December 21, 1998, the Department declined to offer any advisory opinion, noting that it "prefers to construe its statutes in actual cases based on tested evidence."

The Department now has before it a formal petition to approve the Compact's Plan. The question is no longer abstract or advisory, but essential to address. In addition, since 1998, when the Compact first requested an advisory ruling, the relevant facts and circumstances have changed dramatically. The Compact has completed the development of its aggregation plan, negotiated a contract with a competitive energy supplier, filed

the aggregation plan and contract with the Department, and obtained formal approval of the aggregation plan on August 10, 2000.(3) The Compact has also completed and filed its Energy Plan for certification. DOER, given the changed facts, now agrees that the Compact has met the five criteria it previously set out and that the Compact is "establishing a load aggregation program." November 16, 2000 DOER letter (Attachment A). The DOER offers its "opinion that the Compact's Energy Plan is wholly consistent with state energy conservation goals." In the same letter, DOER supports the Compact's position that it "could assume control of the Energy Efficiency funds from the local distribution company and expend them in an efficient and productive manner."

The Compact provides a more detailed argument below to support the conclusion that it is "establishing a load aggregation program" and, therefore, eligible to submit its energy plan for certification by the Department.

THE COMPACT IS "ESTABLISHING A LOAD AGGREGATION PROGRAM"

The 1997 Restructuring Act creates an opportunity for municipalities to run ratepayer-funded energy efficiency programs but places conditions on when municipalities can seek access to energy efficiency funds. Section §134(b) provides, in relevant part:

A municipality or group of municipalities establishing a load aggregation program pursuant to subsection (a) may, by a vote of its town meeting or legislative body, whichever is applicable, adopt an energy plan which shall define the manner in which the municipality or municipalities may implement demand side management programs and renewable energy programs that are consistent with any state energy conservation goals developed pursuant to chapter 25A or chapter 164. After adoption of the energy plan by such town meeting or other legislative body, the city or town clerk shall submit the plan to the department to certify that it is consistent with any such state energy conservation goals.

The key language is that a "group of municipalities establishing a load aggregation program" may adopt an energy plan. The legislature did not require, through explicit wording in the statute: i) that the municipalities "have established" a load aggregation program; or ii) that they first sign generation supply contracts; or iii) that they first deliver energy to consumers, all as a prerequisite to filing an energy plan. The legislature contemplated that municipal aggregators, such as the Compact, could move forward with their energy plans prior to actual delivery of energy to consumers under an aggregation program. This conclusion is consistent with the precise language the legislature chose and with public policies that underlie Section 134(b).

The language that the legislature employed is plain and simple, and the ordinary meaning of the words chosen should be followed. G.L. c. 4, §6, cl. 3 ("Words and phrases shall be construed according to the common and approved usage of the language . . ."). The word "establishing" plainly has a distinct meaning from the word "established." "Establishing a load aggregation program" does not connote that a municipal aggregator must already be delivering electricity to consumers. The Department can readily find that the Compact is "establishing a load aggregation program" because it formally approved that program on August 10, 2000.

Some party may assert, however, that a municipal aggregator must have fully "established" or implemented its aggregation program (in the sense of delivering energy to consumers) as a condition precedent to accessing energy efficiency funds. Such an interpretation of Section 134(b) would do violence to legislative intent. In interpreting statutes, courts routinely follow the:

general and familiar rule that a statute is interpreted according to the intent of the legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.

Lincoln-Sudbury Regional School District v. Brandt-Jordan Corp., 356 Mass. 114, 117-118 (1969)(internal quotations and citations omitted). By adopting Section 134, the legislature's "main object" was to provide municipalities the opportunity to implement aggregation programs and develop their own energy plans. Further, the legislature did not intend that a municipal aggregator must be delivering energy under its aggregation plan in order to implement its energy plan:

The General Court intended that municipalities who have received approval of their aggregation plan from DTE have indeed established a load aggregation program and are eligible upon certification from DTE to implement their energy plan.

November 24, 2000 Letter from Rep. Bosley, House Chair of Government Regulations, to Robert Mahoney, Chairman of the Cape Light Compact (emphasis added)(Attachment B).

In interpreting legislative intent, the Department should bear in mind that energy efficiency funds collected under G.L. c. 25, §19 come directly from ratepayers, not from the utilities. While companies have thus far enjoyed a monopoly in administering

these funds, they have done so as trustees of the ratepayers' money. By adopting Section 134(b), the legislature intended that municipalities should also be allowed to administer these funds so that ratepayers could possibly receive more benefit for their money. The "imperfection" that the legislature intended to address is that no one other than utilities has been allowed to administer these funds. The legislature was certainly aware that utilities have an inherent bias against energy efficiency programs, given that these programs reduce sales volumes and impact profits.(4) Municipalities, by contrast, have every reason to see these programs succeed. Because of the high costs in the region, the Compact is highly motivated to achieve energy savings. In addition, because of its extensive local network, it is well-positioned to promote market transformation efforts. The legislature intended for municipalities to be given the opportunity to run these programs.

In the absence of explicit legislative language, there is little reason for the Department to assume that the legislature intended for municipal aggregators to be delivering electricity to consumers as a precondition to their administering energy efficiency funds. The legislative requirement that a municipal aggregator be "establishing a load aggregation program" insures that the municipality develops an aggregation plan that meets with Department approval, under G.L. c. 164, §134(a). The Compact has fully met that requirement. In the current market in Massachusetts, whether the Compact's supplier can actually deliver electricity to consumers has nothing to do with the

Compact's ability to run energy efficiency programs. Rather, the delay in supplying electricity is simply the result of a wholesale market that is still not functioning well, especially for small- and medium-sized consumers. Nothing in Section 134(b) begins to suggest that a municipality with an approved aggregation plan should be denied access to energy efficiency funds due to failures of the wholesale supply market.

DOER, which has somewhat overlapping responsibilities with the Department in regard to energy efficiency plans (e.g., under G.L. c. 25A, §11G), has interpreted Section 134(b) in a manner that fully supports the Compact's position. As early as December 9, 1998, DOER took the position that a municipal aggregator must meet five criteria in order to be "establishing a load aggregation program."(5) In a letter dated November 16, 2000 (Attachment A), DOER found that the Compact now meets these criteria(6) and endorses the Compact's plan as "innovative and well planned." Attachment A, at 1. DOER also squarely addresses the question of whether the Compact should be granted access to energy efficiency funds, given that it is "not yet furnishing electric power to members of the aggregation," but concludes that "furnish[ing] a model energy supply contract" the elements of which are "comprehensive and detailed" is sufficient. Id. at 4. Finally, DOER raises the policy concern "whether ratepayer interests would be best served by maintaining administration of the efficiency funds with the investor owned utility or by relinquishing control of the funds to the Municipal Aggregator." In addressing this concern, DOER notes that the Compact's

territory includes 21 towns and 180,000 customers within a single distribution company service territory, and concludes that the Compact could expend energy efficiency funds "in an efficient and productive manner." Id.

Further, there is nothing incongruous about the provider of energy efficiency programs being separate from the provider of generation supply. In every service territory in Massachusetts, there are customers who have already opted for an alternative supplier for generation supply but who are covered by the local distribution company's energy efficiency program. As time goes by and competition increases, more and more customers will fall into this category. Thus, whether the Cape Light Compact or Commonwealth Electric administers energy efficiency funds on Cape Cod and Martha's Vineyard, some of the customers served by the efficiency programs will in fact receive generation supply from a third party. One of the goals of the Restructuring Act is to increase generation competition and bring new, third-party suppliers into the market. But it is contrary to state energy efficiency goals to have administration of energy efficiency funds bounce back and forth between a municipal aggregator and the distribution company that also serves the aggregator's territory, depending on which entity provides energy supply to particular customers.

In allowing municipal aggregators access to energy efficiency funds, the legislature was fully aware not only that municipalities are run by publicly elected officials, but also

that those officials would still have to obtain specific approval of town meeting before submitting an energy efficiency plan to the Department. Section 134(b) [first sentence]. After town meeting approval, the energy plan must then be certified as consistent with state energy conservation goals. These are sufficient checks and balances to make sure that a municipal energy plan will carry out important public policies and be consistent with state purposes. There is simply no reason to add in additional requirements not explicitly included in Section 134(b).

The Compact has engaged in a highly public process to develop its energy plan, following the requirements of Section 134(b). It has met the literal requirements of Section 134 for developing aggregation plans and energy plans. The Department should evaluate the Compact's Plan on its merits, not on procedural requirements that the legislature did not insert into Section 134(b).

CONCLUSION

The Compact is "establishing a load aggregation program" and is eligible to seek certification of its Energy Plan.

Respectfully submitted,

Dated: December 4, 2000

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1. The Compact believes that this provision was not even discussed during the consideration of its aggregation plan and form of electric supply contract in DTE 00-47 and 00-47(A).

2. In a December 9, 1998 letter, DOER listed these criteria: (i) authorization of town meeting to proceed with municipal aggregation; (ii) consultation with DOER prior to submitting the aggregation plan; (iii) filing the plan with the Department for review and approval; (iv) holding of a public hearing by the Department; and (v) approval of the plan by the DTE.

3. The Department approved the compliance filing on October 6, 2000.

4. Utilities have historically sought financial compensation for running energy efficiency programs either in the form of an adjustment for "lost base revenues," e.g., Fitchburg Gas & Electric Light Company, DTE 98-48/98-49, Phase I (1999), or an allowed percentage return on energy efficiency funds expended, e.g., Methods and Procedures to Evaluate and Approve Energy Efficiency Programs, DTE 98-100, at 17-22 (2000)("shareholder incentives").

5. See note 1, supra, for the five criteria.

6. DOER acknowledges in its letter that "only the Department of Telecommunications and Energy has the authority to certify that the Energy Plan is consistent with state energy conservation goals." The Compact agrees that DOER's interpretation of Section 134(b) is not binding. However, the Department's own guidelines note the coordinating roles that the Department and DOER will

play in reviewing energy efficiency programs, and the Compact urges the Department to give DOER's opinions due deference. See DTE 98-100, Final Guidelines, §6.